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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

**JOHN PETTITT, MURPHY LABRADOR  
CORPORATION, MAX GSD TRUST OF 1996 BY  
BARBARA MUSSER, TRUSTEE,**

Plaintiffs,

v.

**JOHN CHIANG, individually and in his capacity as  
STATE CONTROLLER OF THE STATE OF  
CALIFORNIA,**

Defendant.

CV 07-5854 CW

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT  
(Fed. R. Civ. P. 12(b)(6))**

Hearing: April 24, 2008  
Time: 2 p.m.  
Department: 2, Fourth Floor  
Judge: The Honorable  
Claudia Wilken

**INTRODUCTION**

Plaintiffs John Pettitt, Murphy Labrador Corporation, and Max GSD Trust of 1996 by Barbara Musser, Trustee, ("Plaintiffs") allege that 100,000 shares of Cybersource Corporation ("CYBS"), awarded to Pettitt by CYBS as partial compensation for his work for CYBS were "seized without Due Process and converted" by Defendant John Chiang, individually and in his capacity as the Controller of the State of California (collectively "the Controller.") In response to Plaintiffs' initial complaint, the Controller filed a motion to dismiss or for a more definite

1 statement. Prior to the hearing on the Controller's motion, on February 22, 2008, Plaintiffs filed  
 2 a First Amended Complaint, and on the same date the Court issued an order finding the pending  
 3 motion to dismiss moot. However, the First Amended Complaint reveals that the claims  
 4 presented are untimely, and barred by the Eleventh Amendment, and must be dismissed.

## 5 **ARGUMENT**

### 6 **Law Applicable To Rule 12(b)(6) Motions.**

7 A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See North*  
 8 *Star Int'l. v. Arizona Corp. Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal of a claim  
 9 according to this rule is proper only in "extraordinary" cases. *United States v. Redwood City*,  
 10 640 F.2d 963, 966 (9th Cir. 1981). A complaint may be dismissed as a matter of law for two  
 11 reasons: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable theory.  
 12 *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9th Cir. 1984).

13 As the Supreme Court recently explained, "[w]hile a complaint attacked by a Rule  
 14 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to  
 15 provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and  
 16 a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v.*  
 17 *Twombly*, \_\_U.S. \_\_, 127 S.Ct. 1955, 1964 (2007). Rather, the allegations in the complaint  
 18 "must be enough to raise a right to relief above the speculative level." *Id.* at 1964-65. Courts  
 19 will not assume that plaintiffs "can prove facts which [they have] not alleged, or that the  
 20 defendants have violated . . . laws in ways that have not been alleged." *Associated General*  
 21 *Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 526  
 22 (1983).

23 Additionally, all material allegations in the complaint, "even if doubtful in fact," are  
 24 assumed to be true. *Id.* The court must assume the truth of all factual allegations and must  
 25 "construe them in the light most favorable to the nonmoving party." *Gompper v. VISX, Inc.*, 298  
 26 F.3d 893, 895 (9th Cir. 2002). The complaint and all reasonable inferences therefrom are  
 27 construed in the plaintiff's favor. *Walleri v. Fed. Home Loan Bank of Seattle*, 83 F.3d 1575, 1580  
 28

(9th Cir. 1996). Conclusory legal allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *Ove v. Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001).

### I.

#### **PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS**

The claims in the First Amended Complaint are barred by the Statute of Limitations. The United States Supreme Court recently reaffirmed that in considering the timeliness of a section 1983 claim, a federal court “looks to the law of the State in which the cause of action arose” to determine “the length of the statute of limitations.” *Wallace v. Kato*, \_\_ U.S. \_\_, 127 S.Ct. 1091, 1094-1095 (2007). California has a 90 day statute of limitations on claims which contend that the Controller has violated the claimant’s rights with respect to the Unclaimed Property Law. Cal. Code Civ. Proc., §1541. Plaintiffs failed to file their action within 90 days of the Controller’s decision on their claim, and their complaint must therefore be dismissed.

#### **A. The California Statute Of Limitations For UPL Claims Is 90 Days**

California Code of Civil Procedure section 1540 provides that when a person claims an interest in unclaimed property delivered to the Controller, the claimant is required to file a verified claim for the proceeds on a form prescribed by the Controller. The Controller then has 90 days to consider the claim. If aggrieved by the decision of the Controller, the claimant is expressly required to file a judicial action within 90 days of the Controller’s decision. Cal. Code Civ. Proc., §1541. And through section 1566(b), the California Legislature has declared that “[e]xcept as provided in Section 1541, no suit shall be maintained by any person against the state or any officer or employee thereof for or on account of any transaction entered into by the State Controller pursuant to this chapter.” Thus, the 90-day statute of limitations expressly applies to plaintiffs’s grievance with the Controller regarding the unclaimed property at issue.

#### **B. Plaintiffs’s Claim Accrued On March 6, 2007**

Plaintiffs allege that on May 16, 2006, plaintiff John Pettitt “made a claim for the return of the share certificates of CYBS held by Defendant.” (First Am. Compl., ¶ 20. Plaintiffs further allege that “[o]n or about March 6, 2007, Defendant issued its check No. 60-142935 in

1 the amount of \$663,000 to MLC in care of John Pettitt.” (First Am. Compl., ¶ 22.) Plaintiffs  
2 allege that the payment of \$663,000 paid by the Controller on March 6, 2007 was inadequate  
3 because it was based on the Controller’s sale of the shares in December of 2004 at \$6.63 a share,  
4 and not the \$12 per share market value of the shares at the time of the payment of the claim.  
5 (First Am. Compl., ¶ 23.)

6 Under federal law, a § 1983 cause of action accrues “when the plaintiff has ‘a  
7 complete and present cause of action.’” *Wallace*, 127 S.Ct. at 1091, quoting *Bay Area Laundry*  
8 *and Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997).  
9 Specifically, the cause of action accrues when “the plaintiff can file suit and obtain relief.”  
10 *Wallace*, 127 S.Ct. at 1091 (internal quotation omitted). Here, the First Amended Complaint  
11 alleges that on March 6, 2007, the Controller issued a check for \$663,000 in settlement of  
12 Plaintiffs’s UPL claim for the 100,000 shares of CYBS at issue. (First Am. Compl. at ¶ 22.)  
13 Further, plaintiffs’ complaint acknowledges that the Controller advised them on March 6, 2007  
14 that the check was in settlement for the 100,000 CYBS shares which had been sold for \$6.63 per  
15 share on December 17, 2004. (First Am. Compl., ¶ 22.) Thus, when the check was issued,  
16 Plaintiffs were aware of when the Controller sold the stock, how much he received, and how  
17 much he was going to pay them to settle their claim. At the time the check was issued, because  
18 Plaintiffs were in a position to bring their suit to address their contentions, their claim against the  
19 Controller, if any, accrued for purposes of calculating the statute of limitations.

20 The First Amended Complaint discloses that plaintiffs failed to file any legal challenge  
21 to the actions of the Controller within the 90 days provided by section 1541. If not satisfied  
22 with payment by the Controller, Plaintiffs were statutorily required to handle this grievance  
23 through the exclusive judicial proceeding provisions of section 1541, and were further required  
24 to commence this action no later than on or about June 5, 2007 – 90 days after payment of the  
25 claim on March 6, 2007. Instead, plaintiffs waited 257 days from the date the Controller paid  
26 the claim on March 6, 2007 to bring the instant action on November 19, 2007, well outside the  
27 statute of limitations.

28 Simply put, Plaintiffs dispute the amount the Controller paid them under California’s

Unclaimed Property Law for the CYBS shares. Any such claim was statutorily required to be filed within 90 days of the Controller's determination of Plaintiffs's claim. Having filed their action more than 160 days after the statute expired on June 5, 2007, under no scenario can plaintiffs's claims be considered timely. Therefore, the entire action is barred by the applicable statute of limitations, and must be dismissed.

## II.

### **THE ELEVENTH AMENDMENT PRECLUDES THE RELIEF SOUGHT BY PLAINTIFFS**

Plaintiffs seek more than return of their property, they seek "monetary damages, in a manner commensurate with the injuries they have suffered." (First Am. Compl., ¶ 46.) Although Plaintiffs acknowledge that the Controller has returned to them the sum received by the Controller when the CYBS shares were liquidated, Plaintiffs contend that the Controller is "liable to Plaintiffs for the loss in value of the CYBS [shares] after they were seized." (First Am. Compl., ¶ 9.) The Eleventh Amendment does not permit the relief sought by Plaintiffs.

#### **A. The Eleventh Amendment Limits Available Remedies**

The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . ." Historically, the Eleventh Amendment has protected states' treasuries from federal court judgments. *See Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) [Eleventh Amendment precludes actions brought against a state officer where the action is essentially one for recovery of money from the state treasury]. The Eleventh Amendment prohibits a federal court from exercising jurisdiction over a nonconsenting state defendant. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). It is an explicit limitation on federal judicial power and applies to the state and its agencies "regardless of the nature of the relief sought." *Id.* at 100. It bars federal courts from deciding claims against a state and its agencies unless the state has "unequivocally expressed" its consent to suit or there is an "unequivocal expression of congressional intent" to abrogate Eleventh Amendment immunity. *Id.* at 99.

**B. The Relief Sought Violates The Eleventh Amendment**

In the First Amended Complaint, in addition to return of their property, Plaintiffs also seek “monetary damages” from the state. (First Am. Compl. ¶ 46; *see also* ¶ 50 [seeking monetary damages . . . commensurate with the injuries they have suffered”]; Prayer for Relief [seeking “Compensatory Damages.”].) The Ninth Circuit has held that seeking relief such as damages on an unclaimed property claim would “impermissibly require compensation from the State treasury” and is barred by the Eleventh Amendment. *Suever v. Connell*, 439 F.3d 1142, 1148 (9<sup>th</sup> Cir. 2006).

The Ninth Circuit has held that while a claim for return of property may not be barred, a claim for damages against the Controller is subject to an Eleventh Amendment defense. *See Taylor v. Westly*, 402 F.3d 924, 930 (2005) (Eleventh Amendment did not bar plaintiffs’ claims seeking the return of their own stock.) While they style their complaint in part as a request for return of their property, the gravamen of plaintiffs’ action is the request for “damages in the amount of \$1,071,000.00 ” sought in paragraph 25. In fact, plaintiffs concede that they have received a check from the Controller which represents a payment for the 100,000 shares of CYBS stock which escheated to the state. (First Am. Compl., ¶ 22.) Therefore, plaintiffs’ First Amended Complaint makes clear that there is no longer any property to return. This case is solely about monetary damages. “Federal courts may not award retrospective relief, for instance, money damages or its equivalent, if the State invokes its [Eleventh Amendment] immunity.” *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). The plaintiffs’ demand for damages runs afoul of the Eleventh Amendment, and requires a dismissal of the complaint.

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**CONCLUSION**

The First Amended Complaint should be dismissed because the claims presented in it are barred by the statute of limitations, and violate the proscriptions of the Eleventh Amendment.

Dated: March 7, 2008

Respectfully submitted,

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